

# DRAFT

## EVALUATION CRITERIA FOR DELTA SETTLEMENT AGREEMENTS

Negotiated agreements provide the opportunity for all parties to identify what they believe is their share in satisfying the flow objectives for the San Francisco Bay/Sacramento-San Joaquin Delta (Delta). The Department of the Interior (Interior) has developed a set of general principles that it applies when it considers whether to support proposed agreements aimed at implementing the State Water Resources Control Board's (State Board) 1995 Water Quality Control Plan for the Bay-Delta (1995 WQCP). In order to receive Interior support, the proposed agreement, to the extent reasonably possible, should:

- 1) **Ensure compliance with the 1995 Bay-Delta Water Quality Control Plan, at least in concert with other Agreements.** The cornerstone of any workable agreement remains the State Board's 1995 WQCP. The aim of this process is implementing the 1995 WQCP. Any agreement therefore must foster full implementation of the 1995 WQCP and, when combined with other measures, help meet the 1995 WQCP's narrative salmon objective. An agreement seeking State Board approval certainly cannot weaken the protections provided by the 1995 WQCP.
- 2) **Restore equity to the Projects by reducing the scope of their current responsibility for contributing flows and diversifying contributions to the 1995 WQCP flow objectives from among several parties outside the Delta.** California's two major water projects have shared full responsibility for complying with the 1995 WQCP standards for more than three years, only as an interim measure, and have shared full responsibility for Delta standards for almost 40 years (D-990, D-1379 and D-1485). The State Board's current implementation process is intended to distribute participation in 1995 WQCP compliance more broadly and more equitably among all water users within the Delta's watershed. The *US v. SWRCB* (i.e. Racanelli) court decision charges the State Board with the responsibility for determining how best to expand that participation.
- 3) **Enjoy the support of a sound legal and technical foundation.** In order to avoid further conflict and litigation, an agreement should be consistent with federal and state law. The State Board and/or the agreement proponents need to comply with CEQA, NEPA and ESA. In addition, success of the agreement will depend on its ability to fit within the operational framework for the rivers and the Delta and on implementation in a reasonable manner. On issues such as conservation and water banking, some agreements will face the dual challenge of complying with the law and operational standards, which have developed over many years and, in fact, continue to be developed.
- 4) **Promote water contributions from an expanded number of tributary watersheds.** Prior to development in the upstream watersheds, the Delta ecosystem benefitted from water and sediment coming from all the rivers and tributaries that feed it. In order to restore the Delta's ecosystem, the Delta needs to recover at least some of that diversity of in-flows. Consistent with Interior's and Club FED's previous statements to the State Board, proposed agreements should consider the ecological benefits of an approach that would reflect widely shared responsibility throughout the watersheds for both salinity and flow requirements.
- 5) **Provide comprehensive resolution of the contribution issue in an entire watershed of**

**the Sacramento River, San Joaquin River, or one of the tributaries.** Considering the difficulty of distributing the burden of compliance, an agreement ideally should encompass the entire watershed of the Sacramento and/or San Joaquin River. In any case, an Agreement should distribute responsibility at least throughout a tributary watershed in order for the Board and others to better evaluate the Agreement and minimize the time required for hearings. If the Agreement does not include all water rights holders in the watershed, then the Board may consider applying similar criteria for responsibility to the non-settling parties. At the end of the State Board's proceedings, water right holders in similar situations should be treated similarly.

**6) Contribute releases of new, "wet" water that was not flowing to the Delta before the 1994 Accord, not unused, "paper" water that gives no new benefit to the Delta.** In order for any party to receive credit for contributing to the fulfillment of the flow objectives, the water needs to provide some benefit to the Delta ecosystem after the Agreement takes effect. "Giving up" water that already goes downstream to the Delta does not provide any new or different environmental benefit or benefit to the Projects' operations. Providing additional flows, for example, at times the standards are not controlling Project operations will provide little or no added benefit to the Projects.

**7) Be fair and equitable to all concerned.** Considering California law's emphasis on "reasonable use" of the State's waters, the structure for implementing the 1995 WQCP must be reasonable and equitable. An agreement that either imposes an unfair burden on one or more parties or shifts an unfair burden to other "non-agreement" parties should not be considered reasonable.

**8) Apply consistently through the full range of standards and water year types.** An effective agreement should contribute to 1995 WQCP compliance in all water year types, although contributions may be adjusted based on water year type or some other logical criteria.

**9) Allow for changes in the State Board's water quality objectives.** The Delta's WQCP will go through triennial review, which may lead to changes in flow objectives. An agreement should be structured to establish flow contributions that can be adjusted based on changes in the standards. At the least, the agreement should provide for some sort of conflict resolution as circumstances change.

**10) Recognize that other processes are independent of the Board's consideration of implementation plans for the WQCP.** Other venues (e.g. FERC) may set flow requirements in rivers tributary to the Delta. These are separate requirements. However, agreements that look comprehensively at the watershed and the Delta provide the opportunity for meeting the requirements of both the Board and the other venues. While the Board may consider the judgments made in other arenas, those judgments do not dictate the outcome for the State Board. Similarly, the State Board's judgment as to the proper contribution to the Delta's flow objectives do not dictate the outcome in those other arenas.

**11) Consider the fishery impacts in the stream at issue.** Fish who live in or pass through the Delta, particularly anadromous fish, often rely on flows and habitat upstream from the Delta. The focus of these proceedings is the Delta. Proposed agreements should include specific consideration of instream flow needs on each tributary in helping to meet the WQCP's narrative salmon objective.

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